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DEC 21 1995

SECRETARY, BOARD OF
OIL, GAS & MINING

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE FIVE-YEAR)
PERMIT RENEWAL,)
CO-OP MINING COMPANY,)
BEAR CANYON MINE,)
EMERY COUNTY, UTAH)

MEMORANDUM IN OPPOSITION TO
JOINT OBJECTION TO RENEWAL,
APPEAL, AND REQUEST FOR
HEARING

Docket No. ~~94-027~~ 95-025
Cause No. ACT/015/025-93B

Co-op Mining Company (Co-op) respectfully submits this memorandum in opposition to
Petitioners' Joint Objection to Renewal, Appeal, and Request for Hearing.

STATEMENT OF FACTS

1. C.W. Mining Company d/b/a Co-op Mining Company (Co-op) applied for a significant revision to its mining permit, to mine the Tank Seam within its existing permit boundaries. On July 21, 1994 the Division approved Co-op's Application.

2. Petitioners in this matter were the same Petitioners who appealed the July 21, 1994 Division decision to the Board. In their appeal, Petitioners claimed that mining the Tank seam would harm the quality and quantity of water issuing from Big Bear Spring and Birch Spring.

3. On October 25, 1994 and November 17, 1994 the Board conducted a hearing on Petitioners' appeal.

4. On June 13, 1995 the Board issued its Findings of Fact, Conclusions of Law and Order, which included the following:

FINDINGS OF FACT

8. At the evidentiary hearing, the Water Users [Petitioners] presented testimony by certain of its employees and officers concerning the history and development of Birch and Big Bear Springs, and historic flow rates of the springs. The Water Users also presented expert testimony by Mr. Bryce Montgomery, a consulting geologist, about the alleged impacts of Co-op's mining activities on the quantity and quality of flows from the springs, and the geologic mechanisms by which such impacts might occur.

9. Co-op presented evidence in rebuttal by its expert consultants that all water encountered within the Bear Canyon mine was for a variety of reasons hydrological separate from Big Bear and Birch Springs. Co-op's experts also testified that the Tank Seam, the area which it sought to mine pursuant to its application for a Significant Permit Revision, was essentially dry and not in any way linked to the disputed aquifer(s).

The Board then made detailed findings regarding the testimony of Petitioners' and Co-op's experts, including the following summary of those findings:

- 40(c) no direct connection between any water that might in the future be located in the Tank Seam and the ostensible regional aquifer has been established
- 52(a) Tritium analysis establishes that Big Bear spring and water encountered by Co-op during mining are not of the same age, and thus hydrologically distinct;
- 52(b) chemical analysis supports, although it alone does not conclusively establish, the conclusion that Birch spring and the mine water are hydrologically distinct;
- 52(c) the existence of the Blind Canyon fault between the mine and Birch spring would preclude waters encountered in the mine from reaching Birch spring;
- 52(d) Co-op's more-localized hydrologic model supports the conclusion waters encountered in the Bear Canyon mine from perched aquifers and/or the Spring Canyon member of the Star Point sandstone are hydrologically distinct from the springs, which issue from the Panther member of the Star Point sandstone.

5. On or about June 19, 1995, Co-op applied for renewal of its mining permit. On November 2, 1995 the Division renewed Co-op's permit.

ARGUMENT

Rule R645-300-211 allows a hearing only to "the applicant, permittee, or any person with an interest which is or may be adversely affected." Petitioners are not the applicant or permittee.

Petitioners' only interest would arise from an impact on Big Bear and Birch Springs. Co-op's permit renewal cannot affect the springs. In its June 13, 1995 decision, the Board already found Co-op's permit area is hydrologically isolated from the springs. Petitioners are barred from relitigating that issue. Petitioners lack standing to request a hearing, because they do not have an interest which may be adversely affected. Petitioners' Objection is without merit and should be denied.

In Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978), the Court adopted a four-part test to determine if collateral estoppel bars parties from relitigating facts in a subsequent suit:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently, fully, and fairly litigated?

The basis for Petitioners' Objection is their claim Co-op's activities endanger Big Bear and Birch Springs. A central issue litigated in the prior hearing was whether Co-op's permit area is hydrologically isolated from Big Bear and Birch Springs. The identical issue is central to Petitioners' present claims.

On June 13, 1995 the Board entered its Findings of Fact, Conclusions of Law and Order. For purposes of collateral estoppel that order is a final judgment on the merits.

Petitioners are the same entities who intervened in Co-op's application for significant revision.

In Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 391 (Utah App. 1987), the Court stated:

The final element of collateral estoppel requires that the issue was competently, fully, and fairly litigated in the first forum. This element stems from fundamental due process and requires that litigants have their day in court. For purposes of due process, the parties must receive notice reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections.

. . .

Copper State fully participated in the confirmation hearing and had an opportunity to present witnesses on its behalf. Copper State cross-examined the debtor extensively Furthermore, Copper State took the initiative to have the precise issue of the co-maker's liability specifically addressed by the bankruptcy court when it filed its Motion for Order of Clarification, which Motion was denied with prejudice. The notice which Copper State received was sufficient to apprise Copper State of the action and afforded Copper State an opportunity to present its objections and arguments, which it in fact did.

As to the issue at hand -- whether Co-op's permit area is hydrologically isolated from Big Bear and Birch Springs -- Petitioners had their "day in court," and lost. Petitioners were present at the prior Board hearing, and had an opportunity to fully and fairly litigate the issue. In fact, it was Petitioners who raised the issue, and who had the burden of proof on the issue. Petitioners fully participated in the hearing and presented witnesses, evidence and arguments on the issue.

CONCLUSION

The Board has already determined, in a final judgment on the merits, based on the identical issue competently, fully and fairly litigated between the identical parties, that Co-op's permit area is hydrologically isolated from Big Bear and Birch Springs. Petitioners are barred by collateral estoppel from relitigating that issue. Based on that the Board's resolution of that issue, Petitioners do not have an interest which may be adversely affected by Co-op's permit renewal, and lack standing to request a hearing under R645-300-211. Petitioners' Objection to Renewal, Appeal, and Request for Hearing is without merit and should be denied.

DATED this 19 day of December, 1995.


Attorneys for Co-op Mining Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid, to:

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Dated at Salt Lake City, Utah this 19 day of December, 1995.



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